mands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

As a matter of first impression — and many questions of construction are matters of first impression — the breadth of the powers conferred upon the Industrial Court is considerable. This may well have accounted for the Federal Court in *Dr Dutt*'s case[19] taking the view that the Industrial Court could properly award compensation where a dismissal was without just cause or excuse, if in its considered view it did not consider reinstatement should be ordered even though such power is nowhere found within the four corners of the statute. In this context, I would add that the reference by the Federal Court (with approval) to the passage in the judgment of Mukherjee J was clearly not obiter dicta, as suggested by counsel for the company, since the question of the power of the Industrial Court to award such compensation was one of the questions which arose acutely for decision at all levels in that case.

Secondly, the dicta to be found in the judgments in the Indian cases on the functions and powers of Industrial Tribunals referred to by the Federal Court in *Dr Dutt*'s case,[19] are based not on art 38 of the Indian Constitution and its Directive Principles of State Policy, as argued by counsel for the company, but on the following statement by Ludwig Teller in his book, entitled *Labour Disputes and Collective Bargaining* (Vol 1) at p 536:

> Industrial arbitration may involve the extension of an existing agreement, or the making of a new one or in general the creation of new obligations or the modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.

On the contrary, I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from sub-ss (4), (5) and (6) of s 30 of the Industrial Relations Act 1967 (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily.

Counsel for the company had submitted that, in any event, this power of the Industrial Court should be limited to dismissal cases and collective agreement disputes. I regret I find this submission unacceptable. There is no warrant for imposing such a limitation on the power of the Industrial Court to create new rights and obligations. Section 26 of the Industrial Relations Act 1967 is widely drawn and refers to trade disputes generally; it makes no distinction between trade disputes connected with dismissals and collective agreements on the one hand and other trade disputes.

Consequently, I would hold that, in any event, there was a legal basis for the Industrial Court to have made the award concerned.

In the result, I would dismiss this application with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok; Mohideen & Asamaley.*

Reported by *Zarinah Marican*

United Asian Bank Bhd v Bhassie

HIGH COURT (KUALA LUMPUR) — SUIT NO C 2078/84
ZAKARIA YATIM J
21 NOVEMBER 1990

Civil Procedure — Further argument — Reception of new affidavit or fresh evidence at further argument in open court of matter heard in chambers — Rules of the High Court 1980, O 56 r 2

In this case the plaintiff applied in chambers for an order that the statement of defence and counterclaim of the defendant be struck out and dismissed respectively with costs. The application was heard in chambers and was dismissed with costs. The plaintiff then applied for an adjournment of the matter into open court for further argument. The plaintiff had filed a new affidavit after the order made in chambers, the admissibility of which was opposed to by counsel for the defendant. The question is whether a new affidavit or fresh evidence can be introduced at the stage of further argument.

Held, disallowing the admission of the new affidavit:

(1) When a matter is adjourned into open court for further argument, no fresh evidence or new affidavit should be considered at the hearing of the further argument, for further argument does not mean further evidence or further affidavit.

(2) The purpose of further argument is to give the judge an opportunity to reconsider the order that he had made in chambers based on the evidence that was before him in chambers. Thus, introduction of further affidavit or fresh evidence at the further argument stage will mean the judge having to consider the whole matter afresh which will defeat the purpose of further argument.

(3) The admission of fresh evidence or new affidavit at the further argument stage is discretionary, and the circumstances in which fresh evidence can be admitted on appeal, ie where the evidence could not be obtained with reasonable diligence for use at the trial, where the evidence, if given, would probably have an important influence on the result of the case, and where the evidence must be such as is presumably to be believed, are applicable in admitting fresh evidence at the further argument stage.

[Bahasa Malaysia summary

Di dalam kes ini plaintif memohon dalam kamar untuk satu perintah supaya pernyatan pembelaan dan tuntutan balas defendan dibatal dan ditolak masing-masing dengan kos. Permohonan itu telah dibicarakan di dalam kamar dan telah ditolak dengan kos. Plaintif kemudiannya memohon untuk

menangguhkan perkara itu ke mahkamah terbuka untuk hujah lanjut. Plaintif telah memfail satu afidavit baru selepas perintah yang dibuat di dalam kamar, dan kebolehterimaan afidavit ini telah dibangkang oleh peguambela defendan. Soalan yang timbul ialah sama ada satu afidavit baru atau keterangan baru boleh dimemukakan di peringkat hujah lanjut.

Diputuskan, tidak membenarkan penerimaan afidavit baru itu:

(1) Apabila satu perkara ditangguhkan ke dalam mahkamah terbuka untuk hujah lanjut, tiada keterangan baru atau afidavit baru harus dipertimbangkan di perbicaraan hujah lanjut, kerana hujah lanjut tidak bermakna keterangan lanjut atau afidavit lanjut.

(2) Tujuan hujah lanjut ialah untuk memberikan hakim peluang untuk mempertimbangkan semula perintah yang telah dibuatnya di dalam kamar berdasarkan keterangan yang ada berhadapannya di dalam kamar. Lantaran itu, pengemukaan afidavit lanjut atau keterangan baru di peringkat hujah lanjut akan bermakna hakim terpaksa mempertimbangkan seluruh perkara itu semula dan ini mengalahkan tujuan hujah lanjut.

(3) Penerimaan keterangan baru atau afidavit baru di peringkat hujah lanjut adalah di bawah budicara, dan keadaan-keadaan dalam mana keterangan baru boleh diterima semasa rayuan, iaitu di mana keterangan tidak boleh diperolehi dengan ketekunan yang munasabah semasa perbicaran, di mana keterangan, jika diberikan, berkemungkinan akan menzahirkan pengaruh yang penting ke atas keputusan kes itu, dan di mana keterangan adalah sedemikian sehinggakan disangka boleh dipercayai, adalah terpakai dalam menerima keterangan lanjut diperingkat hujah lanjut.]

Cases referred to

1 *Re Munns and Longden* (1884) 32 WR 675 (folld)
2 *Tung Lieng (Penang) Trading Co Sdn Bhd* v *Liew Cheong Thye* [1986] 2 MLJ 197 (refd)
3 *Guannex Leasing Sdn Bhd* v *Sebastian & Anor* [1991] 1 MLJ 109 (refd)
4 *Ladd* v *Marshall* [1954] 3 All ER 745 (folld)
5 *Skone* v *Skone* [1971] 2 All ER 582 (refd)

Legislation referred to

Rules of the High Court 1980 O 56 r 2

R Kumarasamy (Miss) for the plaintiff.
Harpal Singh for the defendant.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiff for an order that:

(a) the defence and counterclaim dated February 1985 be struck out and the counterclaim dismissed;
(b) the costs of the application and the costs of the action be paid by the defendant to the plaintiff as taxed.

The application was heard in chambers and after hearing both counsel for the plaintiff and for the defendant, I dismissed the application with costs. On the application of counsel of the plaintiff, I adjourned the matter into open court for further argument.

At the commencement of the hearing in open court, Mr Harpal Singh, counsel for the defendant, objected to the admissibility of an affidavit, which was filed on behalf of the plaintiff after the plaintiff's application had been dismissed. He asked the court not to consider the said affidavit at the further argument stage. In support of his argument, he cited an English case *Re Munns and Longden.*[1] In that case, the matter was heard by a judge-in-chambers. It was argued fully and the learned judge gave his decision. An application was made to set aside the order of the learned judge and at the hearing of the application in open court the applicant sought to introduce further evidence. It was held that the court would not receive further evidence on a motion to discharge an order made in chambers.

Miss Kumarasamy, counsel of the plaintiff, submitted that the whole purpose of further argument was to rehear the matter. She said that the decision made in chambers was an interlocutory order and when the matter was adjourned into open court for further argument, it was not an appeal against the order made in chambers. She added that the order made in chambers was not res judicata and the court was not functus officio. According to her, by admitting the said affidavit, no prejudice would be caused to the defendant because the defendant himself had the opportunity to file an affidavit in reply. She said that the court had jurisdiction to admit an affidavit at the further argument stage.

It is common practice that when a party is dissatisfied with the decision of a judge-in-chambers, that party may apply to the same judge, within the prescribed time, to have the matter adjourned into open court for further argument under O 56 r 2 of the Rules of the High Court 1980. If the judge refuses the application he will issue a certificate that he requires no further argument. When he issues the certificate he is functus officio. See *Tung Lieng (Penang) Trading Co Sdn Bhd* v *Liew Cheong Thye.*[2] If the judge agrees to adjourn the matter into open court for further argument, it is not for the purpose of rehearing the matter already heard in chambers, as contended by Miss Kumarasamy. In *Guannex Leasing Sdn Bhd* v *Sebastian & Anor,*[3] I said:

> ... If the matter is adjourned into open court for further argument, the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the judge ...

The question now is whether new affidavit or fresh evidence can be introduced at the further argument stage. The case, *Re Munns and Longden,*[1] cited by Mr Harpal Singh, may be relevant to the present case. According to that case when a judge has heard and determined a matter in chambers he had no power to

adjourn the matter into open court. The applicant applied by a motion to discharge the order made in chambers. At the hearing of the motion, further evidence in support of the application was introduced. In his judgment in that case, Kay J said:

> ... It often happened that, after a case has come before a judge-in-chambers, and he has heard it fully argued and given his decision, he is asked to adjourn it into court. When the judge has deliberately heard and determined the matter, there is no power of adjourning into court. The question is here raised whether the judge is, after a case is heard in chambers, able to receive further evidence on a motion to discharge the order ... After a judge has given his reasons and shown the weak points of the case, if it were the practice to allow further evidence to be put in, that would be a most dangerous practice. There being a total absence of precedent or practice for allowing such further evidence to be used, I must refuse to receive it. If there were such a practice, it would amount to a practice of reviewing the decision by the judge. When the court is called on and admit further evidence it must be satisfied that the evidence in question could not have been given before ...

Although in England, as indicated in *Re Munns*,[1] there is no rule similar to our O 56 r 2, it seems to me that that case may be regarded as analogous to the present case. I therefore propose to adopt the principle laid down in that case for the purpose of the present case.

Accordingly, when a matter is adjourned into open court for further argument, no fresh evidence or new affidavit should be considered at the hearing of the further argument. Further argument does not mean further evidence or further affidavit. According to *Mallal's Supreme Court Practice* (2nd Ed) Vol 1 at p 683, the purpose of further argument ' ... is to give the judge an opportunity to reconsider the order he has made, in the somewhat hurried circumstances of a hearing in chambers, on a chambers day ... '. I respectfully agree with the view expressed by *Mallal's*. When the matter is adjourned into open court for further argument, the judge has the opportunity to 'reconsider' the order he made in chambers based on the evidence before him in chambers. If parties are allowed to introduce fresh evidence or further affidavit at the further argument stage, then the judge will have to consider the whole matter afresh and this will defeat the purpose of further argument.

The question of admitting fresh evidence or new affidavit at the further argument stage is however at the discretion of the court. But the discretion is not an unfettered one.

The court, may only exercise its discretion to admit fresh evidence under certain circumstances. In exercising its discretion it has to apply the right principle. In my view, the principle laid down by the Court of Appeal in England in admitting fresh evidence on appeal, applies to a case where a party wishes to introduce fresh evidence at the further argument stage. The principle has been stated by Denning LJ in *Ladd* v *Marshall*.[4] In his judgment in that case at p 748 he said:

> ... In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible ...

The above passage was approved by the House of Lords in *Skone* v *Skone*.[5]

I shall now consider whether the three conditions have been satisfied in the present case. The affidavit in question does not show that the evidence contained therein could not have been obtained with reasonable diligence for use at the hearing in chambers. The letters exhibited to the affidavit are correspondence between the plaintiff and the defendant in 1982 and 1983, that is, long before the date of hearing in chambers. These letters were in the custody of the plaintiff but they chose not to produce them when their application was heard in chambers. Secondly, upon reading the affidavit and the letters exhibited to it, I do not think they would have an influence on the result of the case even though the evidence might be credible.

For the reasons stated above, I rule that the affidavit in question cannot be admitted as evidence at the hearing of further argument in open court in the present case.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; AJ Ariffin Chong & Harpal.*

Reported by *Wong Kim Fatt*